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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-327

PEOPLE OF THE STATE OF ILLINOIS, EX REL., JACK HOOGASIAN, STATE'S ATTORNEY OF LAKE COUNTY, AND JULIUS ABLER, A RESIDENT OF THE AFFECTED AREA,
Petitioner.

vs.

SEARS, ROEBUCK AND CO., A NEW YORK CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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Petitioner,

vs.

SEARS, ROEBUCK AND CO., A NEW YORK CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, SEARS, ROEBUCK AND CO., pursuant to Rule 24 of this Court [U. S. Sup. Ct. Rule 24, 28 U. S. C. A.], respectfully submits its brief in opposition to the petition for writ of certiorari and prays that said petition be denied because, no federal question was raised below and therefore, this Court lacks jurisdiction to review the judgment of the Supreme Court of Illinois and further, that there is no reason to grant said writ.

OPINION BELOW.

The Supreme Court of Illinois issued its opinion in this case on September 20, 1972. A full copy of that opinion is set out in the Appendix to this brief.* A copy of the final order of the Supreme Court of Illinois is set out in the Appendix to the Petition at pages 5a-7a. The Memorandum Opinion of the Circuit Court of the Nineteenth Judicial District, Lake County, Illinois is set out in the Appendix to the Petition at pages 9a and 10a.

JURISDICTION.

Since petitioner did not raise any federal question in the Illinois Courts, the jurisdictional requisites relied on by petitioner have not been satisfied, and this Court is therefore, without jurisdiction. Additionally, assuming arguendo the requisite jurisdiction, petitioner has totally failed to establish any ground for this Court to review the proceedings in the Supreme Court of Illinois on a writ of certiorari.

QUESTIONS PRESENTED.

The questions appearing under the heading "Questions Presented" in the Petition are misleading and totally disregard the issues presented by the Petition. Respondent, therefore, counterstates those questions more accurately, as follows:

1. Whether any federal right was set up or claimed in the Illinois courts so as to give this Court a basis upon which to assert its appellate jurisdiction?

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* A similar case entitled *Albert J. Smith, et al.* v. *Sears, Roebuck and Co.*, was consolidated with the case before this Court for argument and decision before the Supreme Court of Illinois. Plaintiffs in that suit have not sought review by this Court.

2. Whether this case is appropriate for review by this Court?

3. Whether the Supreme Court of Illinois was correct in affirming the ruling of the trial court that respondent has proprietary rights in and to the airspace above its property?

4. Whether the Supreme Court of Illinois was correct in affirming the ruling of the trial court that respondent has a legal right to construct a building on its property?

5. Whether the Supreme Court of Illinois was correct in affirming the trial court's ruling that respondent has no obligation to assure the receivers of television signals a perfectly clear, uninterrupted picture?

6. Whether the Supreme Court of Illinois was correct in affirming the ruling of the trial court, striking petitioner's Complaint for want of equity and dismissing its cause of action?

STATEMENT OF THE CASE.

The State's Attorney of Lake County, Illinois, acting on behalf of the People of the State of Illinois, filed suit against respondent, Sears, Roebuck and Co., in the Circuit Court of Lake County, Illinois, seeking to enjoin completion of the construction of a new building in downtown Chicago, Cook County, Illinois, contending that because of alleged reradiation or reflection of television signals from the building, there will be a distortion of television reception to the detriment of a portion of the viewing public, thus causing a public nuisance.

Respondent filed a Motion to Dismiss on the ground that the Complaint did not state a cause of action. The Motion was granted. The suit was dismissed. Petitioner appealed

to the Supreme Court of Illinois which affirmed the ruling of the trial court.

Before discussing the merits of the Petition, it seems only proper to review for the Court some of the background of the controversy. As set forth in the Complaint [see Petitioner's Appendix, pages 1a-4a], Sears, Roebuck and Co. owns a square block in downtown Chicago. Pursuant to appropriate zoning regulations and requisite authority from the City of Chicago, Sears announced in July of 1970 that it planned to erect a 110-story building on its land, which building has now been under construction since the early fall of 1970. Some time prior to this announcement, some television stations located their transmitters on the John Hancock Building, presumably because it was then about to become the city's tallest structure. Other television stations have not moved to the Hancock Building and at this time continue to broadcast from other buildings in or near the downtown Chicago area. Among them are Marina City, the Board of Trade Building and 1000 Lake Shore Drive, buildings substantially lower than the John Hancock Building. Their telecasts are now and for many years have been distorted in certain areas because of reradiation or reflection of television signals from structures other than the Sears building.

Television antennae are planned for construction on the top of the Sears' structure. Approval of such construction was granted by the Federal Aviation Administration, based upon its finding that such construction would not be a hazard to air navigation and, hence, would not affect the public safety. Two Chicago television stations, Channels 7 and 26, have announced that they plan to utilize antennae to be constructed on the top of the Sears building. Other telecasters may conclude that they, too, should consider such a move. Obviously, the signals of those who broadcast from the Sears building will not be affected by that building.

Petitioner based its Complaint on the erroneous and

onerous assumption that the law will permit a person to be divested of a valuable proprietary right through circumstances and acts created and committed by totally independent third parties over which respondent has no control. It is of paramount importance to note that the television stations by their own action selected the sites for their transmitters and placed them adjacent to one of the largest concentrations of tall buildings in the world—downtown Chicago. The television stations elected to beam their signals from these points across the downtown area, and the distortions alleged in the Complaint are those that may result when these signals strike the Sears building.

Petitioner's own pleadings substantiate and buttress respondent's contention and in fact admit that it is not the act of respondent which might cause the condition complained of, but rather it is the proscribed and proprietary utilization of respondent's property by some television stations (those stations which may not be located on the Sears building) after their signals cross Sears' property line which will cause the alleged unsatisfactory reception. Hence, if the petitioner anticipates injury, real or fancied, the sources of that injury are such television stations and not this respondent.

At the time the several television stations chose to locate their transmitters on the various buildings from which they presently beam their signals, the law did not, and it does not now, proscribe the erection of additional skyscrapers. Certainly the broadcasters knew this, and, knowing of the growth in the downtown area, they could reasonably expect the erection of even taller buildings than those existing at the time they erected their antennae. If Sears, and others, cannot construct buildings to the height desired, except where prohibited by valid legislation, then their property rights will be expropriated in violation of long established and well recognized legal principles and rights.

ARGUMENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

I.

This Court Does Not Have Jurisdiction to Review the Judgment of the Supreme Court of Illinois Entered June 30, 1972.

Respondent respectfully submits that this Court lacks jurisdiction to review the judgment of the Supreme Court of Illinois in this case. Petitioner attempts to invoke this Court's appellate jurisdiction pursuant to Title 28, Section 1257(3) of the United States Code, which provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • • • •
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. [28 U. S. C. A. § 1257(3), (1970)]

In the Petition it is asserted that ". . . [a] title, right, privilege or immunity is specially set up or claimed under the Constitution . . . [of] the United States." However, as petitioner's Appendix clearly demonstrates, no such "title, right, privilege or immunity" was in fact ever set up or claimed at any previous stage of the proceedings in this case, either in the trial court or in the Supreme Court of Illinois. The constitutional provisions allegedly "in-

volved", the First Amendment and the Commerce Clause, were injected into this case for the first time in the Petition for a Writ of Certiorari. This is neither timely nor procedurally appropriate. The decisions of this Court are literally legion in holding that constitutional issues raised for the first time in a Petition for Writ of Certiorari do not afford a sufficient basis for this Court's exercise of its appellate jurisdiction to review a decision of a state court. Illustrative of that line of decision is the case of *Mallers* v. *Commercial Loan & Trust Company*, 216 U. S. 613 (1910), wherein this Court refused to review a decision of the Supreme Court of Illinois, holding in a *per curiam* opinion:

> The case was then brought here on writ of error, which must be dismissed for want of jurisdiction. [citations omitted]
>
> No Federal question was raised in the state courts, and the attempt to raise a Federal question in the assignment of errors in this court not only came too late, but was palpably not maintainable. [citation omitted] [216 U. S. 613 at 614]

In a subsequent case *Cleveland & Pittsburgh Railroad Company* v. *City of Cleveland, Ohio*, 235 U. S. 50 (1914), this Court, citing the *Mallers* case, *supra*, dismissed the writ of error and held:

> In order to bring a case here under § 237 of the Judicial Code [citation omitted] [the predecessor to Title 28 Section 1257(3)], it is well settled that the Federal right must have been set up and adjudicated against the claimant by the judgment of the state court. It is equally well settled that the contention made and passed upon in the state court cannot be enlarged by assignments of error made to bring the case to this court. This proposition is too well settled to need discussion. [citations omitted] [235 U. S. 50 at 53.]

In the case of *Burt* v. *Smith*, 203 U. S. 129 (1906), this Court was asked to review a decision of the highest court

of New York state affirming the dismissal of a common law tort action, for malicious prosecution. In dismissing the writ for want of jurisdiction, this Court held, in an opinion by Mr. Justice Holmes, that:

> . . . it would be going further than we are prepared to go if we took jurisdiction upon the ground stated in this case. [Citation Omitted] The record discloses no question under the Constitution or laws of the United States until we come to the assignment of errors in this court. Then it was too late. [Citation Omitted] It is true that the complainants allege the decree, but that was merely to show that the litigation complained of was ended, as was required by the law of New York [Citation Omitted], not to suggest a Federal question, which at that moment probably was not dreamed of. [203 U. S. 129 at 135]

In *Kipley* v. *People of the State of Illinois ex rel. Akin*, 170 U. S. 182 (1898), this Court stated:

> We are of the opinion that this court is without jurisdiction to review the final judgment of the supreme court of Illinois in these cases. The answer makes no reference whatever to the Constitution or laws of the United States. It is true that it avers that the Illinois civil service act was "unconstitutional and void." But when the jurisdiction of this court is invoked for the protection, against the final judgment of the highest court of a state, of some title, right, privilege, or immunity secured by the Constitution or laws of the United States, it must appear expressly or by necessary intendment, from the record, that such right, title, privilege, or immunity was "specially set up or claimed" under such Constitution or laws. Rev. Stat. 709. [Referring to a predecessor of Title 28 Section 1257(3) of the United States Code] Our jurisdiction cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the

> case up intended to assert a Federal right. [citations omitted] [170 U. S. 182 at 186-187]

Here too, no federal question was suggested, let alone raised, during the proceeding in the Illinois courts.

Emphasizing the aforementioned fatal defect in the Petition is the fact that petitioner did not, because obviously it could not, comply with the provisions of Rule 23(1)(f) of the Court, [U. S. Sup. Ct. Rule 23(1)(f), 28 U. S. C. A.]. That rule provides:

> 1. The petition for writ of certiorari shall contain in the order here indicated—
>
> * * * * *
>
> (f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.
>
> Where the portions of the record relied upon under this subparagraph are voluminous, then they shall be included in an appendix to the petition, which may, if more convenient, be separately presented.

Petitioner's statement of the case is totally devoid of any reference to the stage in the proceedings, either in the Circuit Court of Lake County or in the Supreme Court of Illinois, at which, or the manner in which the

Federal questions sought to be reviewed were raised. The significance of this critical omission is patent. Petitioner's Appendix clearly shows that no Federal question was ever raised in the Illinois courts. Thus this Court lacks jurisdiction to review the decision of the Supreme Court of Illinois.

II.

The Judgment of the Supreme Court of Illinois Is Not Appropriate or Fit for Review by This Court

Assuming, *arguendo*, that this Court has jurisdiction to review the decision of the Supreme Court of Illinois, respondent submits that this Court should, in the exercise of sound judicial discretion, deny petitioner's request for a writ of certiorari.

Rule 19 of the rules of this Court declares:

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. . . . [U. S. Sup. Ct. Rule 19(1), 28 U. S. C. A.]

Notwithstanding petitioner's claims, there are no special or important reasons for granting the writ. As clearly demonstrated, there are no federal rights involved. The Appendix patently establishes that the only claim asserted below was that by erecting a building, respondent was creating a common law nuisance. Petitioner emphasizes and admits this fact at page 5 of the Petition where, in conclusion, it states that respondent's actions are "a public nuisance that is abatable."

The Supreme Court of Illinois reviewed petitioner's contention in the light of well established principles of law and properly concluded that respondent's construction of a

building constituted an exercise of its legal rights and did not constitute a nuisance.

There are simply no novel or unique issues involved in this case, much less a federal question. And, for this reason too, the Court should deny the Petition.

CONCLUSION.

Both because this Court lacks jurisdiction to review this case and because the exercise of sound judicial discretion requires it, this Court should deny the Petition For Writ of Certiorari to the Supreme Court of Illinois and decline to review this case.

Respectfully submitted,

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APPENDIX.

OPINION

SUPREME COURT OF ILLINOIS
United States of America

STATE OF ILLINOIS
SUPREME COURT } ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ____ day of _____ in the year of our Lord, one thousand nine hundred and ____, within and for the State of Illinois.

Present: ROBERT C. UNDERWOOD, *Chief Justice.*
JUSTICE WALTER V. SCHAEFER.
JUSTICE DANIEL P. WARD.
JUSTICE JOSEPH H. GOLDENHERSH.
JUSTICE THOMAS E. KLUCZYNSKI.
JUSTICE CHARLES H. DAVIS.
JUSTICE HOWARD C. RYAN.

WILLIAM J. SCOTT, *Attorney General.*
ROBERT G. MILEY, *Marshal.*
Attest: JUSTIN TAFT, *Clerk.*

Be It Remembered, that afterwards, to-wit, on the ____ day of _____, 19____ the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

Nos. 45199, 45216 Cons.

PEOPLE EX REL. JACK HOOGASIAN, State's Attorney of Lake County, et al., etc., et al.,
Appellants,
vs.
SEARS, ROEBUCK & COMPANY, a New York Corporation,
Appellee.

Appeal from Circuit Court Lake County

Docket Nos. 45199, 45216 cons.—Agenda 58
May, 1972.

THE PEOPLE EX REL. JACK HOOGASIAN, State's Attorney, *et al.*, Appellants, v. SEARS, ROEBUCK AND CO., Appellee.—ALBERT J. SMITH *et al.*, Appellant., v. SAME APPELLEE.

MR. JUSTICE KLUCZYNSKI delivered the opinion of the court:

In cause 45199, the People of the State of Illinois *ex rel.* Jack Hoogasian and Julius Abler filed suit in the circuit court of Lake County to enjoin defendant from completing construction of its building in the city of Chicago. In cause 45216, the villages of Deerfield, Skokie and Northbrook and certain officials of Deerfield and Skokie, subsequently filed a similar suit in the circuit court of Cook County, charging that when completed the building would constitute a nuisance and that distortion of television reception would depress property values in the areas involved.

Defendant's motion to dismiss the complaint for failure to state a cause of action was granted in the Lake County proceedings and appeal was taken. Thereafter, in the Cook County suit, a similar motion, which additionally averred that the action was now barred by *res judicata* as a result of the judgment of the circuit court of Lake

County, was granted. Several plaintiffs in this action have appealed. We assumed jurisdiction of both appeals under Supreme Court Rule 302(b) and consolidated the causes for decision and opinion. On June 30, 1972, we entered an order affirming the judgments of the circuit courts, with an opinion to follow. We now express our views for such order.

The complaints basically alleged that defendant envisions the construction of a building in the city of Chicago which will reach a height of 110 stories or 1350 feet. At the approximate time of the filing of these actions the construction had progressed to a height of 50 stories. Plaintiffs alleged that if construction was allowed to continue the building would interfere with television reception in certain areas. This interference would occur because the broadcasting antennas of Chicago television stations are lower than the contemplated structure which would cause the signals that emanate from these antennas to abnormally reflect from defendant's building thereby allegedly producing distortions on television screens in these areas.

The principal issue in this case is whether defendant has a legal right to use the air space above its property subject only to legislative limitation, or stated conversely, whether an individual or class of individuals has the right to limit the use of such property on the basis that interference with television reception constitutes an actionable nuisance.

Plaintiffs cite *Shelburne, Inc.* v. *Crossan Corp.* (1923), 95 N. J. Eq. 188, 122 A. 749; *Hansen* v. *Independent School District No. 1* (1939), 61 Idaho 109, 98 P. 2d 959; and *Belmar Drive-In Theatre Co.* v. *Illinois State Toll Highway Com.*, 34 Ill. 2d 544, to support their contention, but they contend that there is no authority involving radio or television broadcasting which discusses this precise issue. All aforementioned cases involve light transmitted from

one parcel of property which caused interference with the use of another's property. In *Shelburne* and *Hansen* the transmission of light was found to be a nuisance; in *Belmar* the transmission was not considered as such because the plaintiff, in operating a drive-in theatre near a toll highway, had put its property to a hypersensitive use so that lights cast upon its screen from the highway plaza could not be considered a nuisance. However, we do not believe these cases are supportive of plaintiff's contention, for, in the instant case, defendant's property is not the source of transmission, but rather the property over which a transmission passes.

Fontainebleau Hotel Corp. v. *Forty-Five Twenty-Five, Inc.* (Fla. Dist. Ct. App. 1959), 114 So. 2d 357, more closely parallels the issues involved in this case. There plaintiff sought to enjoin the completion of an addition to defendant's building because, when completed, the structure would have significantly interfered with the light and air on the beach in front of an adjacent hotel. The trial court granted a temporary injunction preventing further construction. The Florida district court of appeals reversed and dismissed the complaint, stating:

> "No American decision has been cited, and independent research has revealed none, in which it has been held that—in the absence of some contractual or statutory obligation—a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor. * * *
>
> "There being, then, no legal right to the free flow of light and air from the adjoining land, it is universally held that where a structure serves a useful and benefical purpose, it does not give rise to a cause of action, either for damages or for an injunction under the maxim *sic utere tuo ut alienum non laedas*, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural

state, regardless of the fact that the structure may have been erected partly for spite. [Citations.]

"We see no reason for departing from this universal rule. If, as contended on behalf of plaintiff, public policy demands that a landowner in the Miami Beach area refrain from constructing buildings on his premises that will cast a shadow on the adjoining premises, an amendment of its comprehensive planning and zoning ordinance, applicable to the public as a whole, is the means by which such purpose should be achieved. (No opinion is expressed here as to the validity of such an ordinance, if one should be enacted pursuant to the requirements of law. [Citation.]) But to change the universal rule—and the custom followed in this state since its inception—that adjoining landowners have an equal right under the law to build to the line of their respective tracts and to such a height as is desired by them (in the absence, of course, of building restrictions or regulations) amounts, in our opinion, to judicial legislation. As stated in Musumeci v. Leonardo, supra [77 R. I. 255, 75 A. 2d 177], 'So use your own as not to injure another's property is, indeed, a sound and salutary principle for the promotion of justice, but it may not and should not be applied so as gratuitously to confer upon an adjacent property owner incorporeal rights incidental to his ownership of land which the law does not sanction'. " 114 So. 2d 357, at 359-360.

We agree with this rationale, for otherwise one party would have the right to enjoin his neighbor from building a home or any other structure on adjacent property if such building interfered with television reception. In effect we have competing legitimate commercial interests, both of concern to public. (See: *Richmond Bros., Inc.* v. *Hagemann* (Mass. 1971), 268 N. E. 2d 680.) The responsibility in this case for inadequate television reception in certain areas rests more with the broadcaster's choice of location than with the height of defendant's building. Therefore

disruption of television signals initiated by totally independent third parties over which defendant has no control cannot be the basis for enjoining the full legal use and enjoyment of defendant's property.

Plaintiffs cite in addition to other cases heretofore discussed, *United States* v. *Causby* (1946), 328 U. S. 256, 90 L. Ed. 1206, for the proposition that a property owner does not have an unlimited right to the use of all the airspace above his property. In *Causby*, military aircraft approaching a nearby airfield flew at extremely low altitudes over private property. The owner sought damages asserting that his property had been taken without compensation as constitutionally required. The United States Supreme Court, in affirming the owner's right of action, recognized that a property owner could not claim exclusive possession of unlimited airspace above his property. However, it noted that the owner could claim exclusive possession of useable portions of the airspace, at least to the extent that it would not interfere with air traffic. "We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case over-hanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land." 328 U. S. 256, at 264.

A similar conclusion was reached in the *Richmond* case where plaintiff sought to enjoin construction of a building on adjacent property which would distort its radio transmitter signals. The court noted that the radio station itself, not the one erecting the building, emitted the radio waves and established the activity or condition which re-

sulted in the nuisance. The court concluded: " 'Doubtless, in the absence of controlling police regulation, one may erect a structure upon his land as high as he desires and is able.' " 268 N. E. 2d at 682.

Considering the foregoing, it is clear to us that absent legislation to the contrary, defendant has a proprietary right to construct a building to its desired height and that completion of the project would not constitute a nuisance under the circumstances of this case. Accordingly, the judgments of the circuit court of Cook County and of the circuit court of Lake County are affirmed. Other questions raised by plaintiffs which are not necessary to the determination of this matter need not be discussed.

Judgments affirmed.

MR. JUSTICE GOLDENHERSH took no part in the consideration or decision of this case.